Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

RANDALL A. TERRY, REVEREND PATRICK MAHONEY, A. DAVID HENDERSON, ROBERT JEWITT, JOSEPH J. SLOVENEC, AND REVEREND JAMES L. RUDD,

*Petitioners,*

- v. -

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, AND ERIC HOLDER, UNITED STATES ATTORNEY FOR THE DISTRICT OF COLUMBIA,

*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Does the Freedom of Access to Clinic Entrances (FACE) Act, 18 U.S.C. § 248, exceed the constitutional powers of Congress under the Commerce Clause, U.S. Const. art I, § 8, cl. 3?

2. Does FACE unconstitutionally discriminate against opponents of abortion in violation of the First and Fifth Amendments, U.S. Const. amends. I, V?

3. Does FACE violate the free speech and assembly guarantees of the First Amendment, U.S. Const. amend. I?

## PARTIES

The names of all the principal parties to the proceedings in the court below appear in the caption of this case.[1] In addition, the following parties were granted status as intervenor-defendants in the district court and filed a brief as intervenor-appellees in the court of appeals:

Capitol Women's Center
Commonwealth Women's Clinic
National Abortion Federation
National Organization for Women
Planned Parenthood Federation of America, Inc.
Planned Parenthood of Metropolitan Washington, D.C.
Dr. George R. Tiller
Dr. Susan Wicklund

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[1]None of the petitioners is a corporation. See Rule 29.6.

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## DECISIONS BELOW

The decision of the court of appeals is reported as Terry v. Reno, 101 F.3d 1412 (D.C. Cir. 1996) (App. A). The decision of the district court is unreported. Terry v. Reno, No. 94-1154(HHG) (D.D.C. Nov. 21, 1995) (App. B & C).

## JURISDICTION

The United States Court of Appeals for the District of Columbia Circuit entered its judgment in this case on December 10, 1996. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS AND STATUTES

The text of the Commerce Clause of, and the First, Fifth and Tenth Amendments to, the U.S. Constitution, are set forth in Appendix D. The text of the Freedom of Access to Clinic Entrances (FACE) statute, 18 U.S.C. § 248, is set forth in Appendix E.

## STATEMENT OF THE CASE

On May 26, 1994, President Clinton signed into law the Freedom of Access to Clinic Entrances (FACE) Act, 18 U.S.C. § 248. That same day, petitioners filed suit challenging the constitutionality of FACE in the United States District Court for the District of Columbia.

Petitioners, Randall A. Terry, Rev. Patrick Mahoney, A. David Henderson, Robert Jewitt, Joseph J. Slovenec, and Rev. James L. Rudd, are outspoken and committed pro-life activists. Petitioners alleged that the threat of enforcement of FACE against petitioners' constitutionally protected but emotionally provocative expressive activities has deterred and chilled petitioners' exercise of their right to free speech and assembly. Petitioners sought declaratory and injunctive relief against FACE both on its face and as construed and threatened to be

applied by federal law enforcement officials.

Petitioners argued that FACE imposes discriminatory, vague, and overbroad restrictions on expressive activity in violation of the First Amendment. Petitioners also argued that FACE exceeds congressional authority and therefore violates the Tenth Amendment.

Respondents are Attorney General Janet Reno and U.S. Attorney Eric Holder, the federal officials charged with enforcement of FACE nationally and in the District of Columbia, respectively. Respondents answered the petitioners' complaint and subsequently moved for judgment on the pleadings under Rule 12(c), Fed. R. Civ. P.

In a memorandum opinion filed on November 21, 1995, the U.S. District Court for the District of Columbia granted respondents' motion for judgment on the pleadings. App. B. "Accepting all well-pleaded facts of plaintiffs' complaint as true," the district court "f[ound] no constitutional violations" in the terms of FACE. App. 26a n.1. The district court entered a judgment order in accord with its opinion. App. C.

Petitioners appealed. On December 19, 1996, a panel of the U.S. Court of Appeals for the District of Columbia Circuit affirmed. App. 1a.

The court of appeals held that FACE fell within congressional authority under the Commerce Clause. App. 5a-13a. Despite this Court's opinion in United States v. Lopez, 115 S. Ct. 1624 (1995), the court below ruled that a federal criminal statute need neither restrict commercial activity, App.

10a, nor contain a jurisdictional element, App. 11a-12a. According to the court of appeals, Congress need only find that the restricted activities, viewed in the aggregate, App. 7a-8a, have a substantial effect on an industry engaged, at least in part, in interstate commerce, App. 6a. "[T]he critical fact," said the court of appeals, was the existence of a "threat to a national market," App. 11a (internal quotation marks, citation, and emphasis omitted), from the regulated noncommercial activities.

The court of appeals also rejected petitioners' First and Fifth Amendment arguments, holding that FACE was not vague, overbroad, or discriminatory. App. 13a-21a. The court specifically ruled that FACE "does not play favorites" because, for example, it would ban both graffiti expressing a pro-abortion viewpoint at a crisis pregnancy center and graffiti expressing an anti-abortion viewpoint at an abortion center. App. 15a.

Petitioners now seek review in this Court.

## REASONS FOR GRANTING THE WRIT

### I. THE PUBLIC HAS A STRONG INTEREST IN RESOLVING THE CONSTITUTIONALITY OF FACE.

Any serious question about the constitutionality of an Act of Congress deserves review by this Court. This Court frequently reviews the constitutionality of federal statutes without waiting for a split in the appellate courts or for an appellate decision invalidating the statute. For example, there appears to have been no split of appellate authority on the constitutionality of the federal statutes at issue in Denver Area Educ.

Telecommunications Consortium, Inc. v. FCC, 116 S. Ct. 2374 (1996); Felker v. Turpin, 116 S. Ct. 2333 (1996); or Colorado Republican Campaign Comm. v. Federal Election Comm'n, 116 S. Ct. 2309 (1996). See also City of Boerne v. Flores, 117 S. Ct. 293 (1996) (granting certiorari to review constitutionality of Religious Freedom Restoration Act in absence of circuit conflict).

FACE essentially provides special federal police power protection for one industry: abortion.[2] Furthermore, FACE targets pro-life protesters for uniquely harsh treatment and imposes vague and overbroad restrictions. FACE therefore raises important questions about the scope of Congressional power and the free speech and equal protection implications of this effort by Congress to weigh in on one side of a national controversy. See infra § II.

FACE has been the subject of widespread constitutional controversy, both in the courts[3] and in the scholarly literature.[4]

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[2]FACE was amended to add certain protection for access to religious facilities. 18 U.S.C. § 248(a)(2), (3). Petitioners are aware of no use of FACE to date to protect places of religious worship. In any event, the religious protection provisions of FACE are not before this Court.

[3]The unconstitutionality of FACE was persuasively demonstrated by the district courts in United States v. Wilson, 880 F. Supp. 621 (E.D. Wis. 1995), rev'd, 73 F.3d 675 (7th Cir. 1995), cert. denied, 117 S. Ct. 46, 47 (1996), and in Hoffman v. Hunt, 923 F. Supp. 791 (W.D.N.C. 1996), appeal pending, Nos. 96-1581, 96-1582, 96-1623 (4th Cir. to be argued Apr. 9, 1997), and by Judge Coffey of the Seventh Circuit in dissent in United States v. Wilson, 73 F.3d 675, 689-702 (7th Cir. 1995), cert denied, 117 S. Ct. 46, 47 (1996). Opinions upholding

FACE include: United States v. Scott, 919 F. Supp. 76 (D. Conn. 1996); Planned Parenthood Ass'n of Southeastern Pennsylvania, Inc. v. Walton, 949 F. Supp. 290 (E.D. Pa. 1996); American Life League, Inc. v. Reno, 47 F.3d 642 (4th Cir.), cert. denied, 116 S. Ct. 55 (1995); Cook v. Reno, 859 F. Supp. 1008 (W.D. La. 1994), vacated, 74 F.3d 97 (5th Cir. 1996), on remand, No. 94-0980 (W.D. La. Nov. 5, 1996); United States v. Soderna, 82 F.3d 1370 (7th Cir.), cert. denied, 117 S. Ct. 507 (1996); United States v. Wilson, 73 F.3d 675 (7th Cir. 1995), cert. denied, 117 S. Ct. 46, 47 (1996); United States v. Dinwiddie, 76 F.3d 913 (8th Cir. 1996), cert. denied, 117 S. Ct. 613 (1996); Riely v. Reno, 860 F. Supp. 693 (D. Ariz. 1994); Council for Life Coalition v. Reno, 856 F. Supp. 1422 (S.D. Cal. 1994); United States v. White, 893 F. Supp. 1423 (C.D. Cal. 1995); Planned Parenthood of Columbia/Williamette, Inc. v. American Coalition of Life Activists, 946 F. Supp. 1355 (D. Or. 1996); Cheffer v. Reno, 55 F.3d 1517 (11th Cir. 1995).

[4]Compare Rose & Osborn, FACE-ial neutrality: A Free Speech Challenge to the Freedom of Access to Clinic Entrances Act, 81 Va. L. Rev. 1505 (1995) (contending FACE violates First Amendment); and Note, About F.A.C.E. in the Supreme Court: The Freedom of Access to Clinic Entrances Act in Light of Lopez, 11 St. John's J. Legal Commentary 191 (1995) (FACE questionable under Commerce Clause); with Comment, "FACE"ing the Facts: Does the Freedom of Access to Clinic Entrances Act Violate Freedom of Speech? 64 U. Cin. L. Rev. 947 (1996) (defending FACE under First Amendment); and Note, "FACE"-ing the Constitution: The Battle over the Freedom of Access to Clinic Entrances Shifts from Reproductive Health Facilities to the Federal Courts, 46 Cath. U.L. Rev. 165 (1996) (defending FACE under Commerce Clause and First Amendment). See also Note, Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248: The Controversy behind the Remedy, 20 Seton Hall Legis. J. 128 (1996) (urging Supreme Court review to resolve constitutional doubts about

As a consequence, the arguments for and against the constitutionality of FACE have been thoroughly developed and are ripe for consideration by this Court.

To those who oppose FACE, whether in principle[5] or in practice, this Act threatens several important interests of constitutional dimension. If FACE is a permissible exercise of Congressional authority, then it is now fair game for any (or all) businesses to seek federalization of laws against trespass, disorderly conduct, vandalism, and the like. And if FACE comports with the rights to free speech and equal protection, then Congress may target other groups -- environmentalist activists, animal rights activists, etc. -- for selectively harsh legislation.

For those who support FACE, meanwhile, the continuing controversy over its constitutionality hampers its use as a criminal and civil litigation tool.

In short, both the public at large and the warring sides of the abortion controversy have a strong interest in the definitive resolution of FACE's constitutional status.

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FACE).

[5]One need not oppose abortion to find fault with FACE. See, e.g., Rose & Osborn, supra note 4, at 1505 n.1 (authors disagree on abortion but agree on unconstitutionality of FACE).

## II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN UNITED STATES v. LOPEZ AND RAISES IMPORTANT AND UNSETTLED QUESTIONS OF CONSTITUTIONAL LAW.

The decision below conflicts with this Court's decision in United States v. Lopez, 115 S. Ct. 1624 (1995). Moreover, the case at bar involves important questions of federal constitutional law which have not been, but should be, settled by this Court.

### A. FACE Represents a Drastic and Unprecedented Expansion of Congressional Authority under the Commerce Clause, in Conflict with Lopez.

Those courts which, like the court below, have upheld FACE, have ruled that FACE falls within the authority of Congress to regulate interstate commerce. App. 5a-13a. In so doing, however, these courts have legitimized a new and dramatic expansion of congressional commerce power and essentially nullified this Court's decision in Lopez.

The crux of the federal government's case is ultimately the contention that FACE directly prohibits interference with persons because they are engaged in the commercial activity of abortion. The government postulates that this fact provides the requisite nexus with interstate commerce.

The premise of this argument is that Congress has the power to prohibit interference with any business. This proposition, however, overlooks the fact that the Constitution gives Congress power over interstate commerce, not commerce per

se (much less anything affecting commerce). This proposition would give Congress plenary police power over all businesses and all activities affecting businesses -- i.e., all human activity.

The United States Constitution establishes a federal government of limited powers, leaving all remaining powers to the states and to the people. U.S. Const. amend. X. Congress enjoys a range of enumerated powers, including the Commerce Power -- the power to "regulate Commerce . . . among the several States," id. art. I, § 8, cl. 3. This power, while broad, is not so limitless as to justify FACE.

Over the past century, the federal judiciary has approved an ever-more expansive interpretation of congressional power under the Commerce Clause. E.g., Wickard v. Filburn, 317 U.S. 111 (1942) (Congress can regulate production of home-grown wheat as part of national regulatory scheme); Perez v. United States, 402 U.S. 146 (1971) (Congress can prohibit extortionate credit transactions even when conducted intrastate). Nevertheless, there are bounds to federal legislative power. If not, "then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

This Court marked the limits of Commerce Clause power in the recent case of United States v. Lopez, 115 S. Ct. 1624 (1995). In Lopez, this Court held that the Gun-Free School Zones Act, 18 U.S.C. § 922(q), which prohibited the possession of a firearm within 1,000 feet of a school, was "invalid as beyond the power of Congress under the Commerce Clause." 115 S. Ct. at 1626.

The Lopez Court "identified three broad categories of activity that Congress may regulate under its commerce power." Id. at 1629 (citation omitted).

1. "First, Congress may regulate the use of the channels of interstate commerce," id., "for example, the shipment of stolen goods . . . or of persons who have been kidnapped," Perez, 402 U.S. at 150 (citations omitted).

2. "Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities." Lopez, 115 S. Ct. at 1629. This category includes, "for example, the destruction of an aircraft . . . or thefts from interstate shipments," Perez, 402 U.S. at 150 (citations omitted).

3. "Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, . . . i.e., those activities that substantially affect interstate commerce." Lopez, 115 S. Ct. at 1629-30 (citations omitted). This category includes such matters as the regulation of wheat production, Wickard, or milk prices, United States v. Wrightwood Dairy Co., 315 U.S. 110 (1942), and the prohibition of extortionate credit transactions, Perez.

As the court below recognized, "Of the three categories of activity the Court held that Congress could regulate pursuant to its Commerce Clause authority, only the third is relevant to this case . . . ." App. 5a. The court below held that FACE qualifies as a valid enactment under the third Lopez category -- a

regulation of activities that "substantially affect" interstate commerce. App. 9a-13a. This conclusion cannot be squared with Lopez.

Lopez identified the ways in which a statute can "regulate those activities having a substantial relation to interstate commerce, . . . i.e., those activities that substantially affect interstate commerce." 115 S. Ct. at 1629-30 (citation omitted). FACE, like the Gun-Free School Zones Act, possesses none of these potential nexuses to interstate commerce.

1. Aggregation of commercial activities

Under Lopez, a statute can regulate "intrastate economic activity" (e.g., growing wheat or mining coal) which "substantially affect[s] interstate commerce." Lopez, 115 S. Ct. at 1630 (emphasis added). Protest against abortion, like the possession of a gun in a school zone, "is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." Id. at 1634 (emphasis added). Likewise, FACE

> is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.

Id. at 1631. In other words, protest and disorderly conduct cannot be analogized to wheat production or milk sales.

2. Jurisdictional element

Second, a statute can regulate noneconomic intrastate activity if the statute contains a "jurisdictional element which would ensure, through case-by-case inquiry, that the [activity] in question affects interstate commerce." Id. at 1631. For example, the federal felony gun possession statute and the federal arson statute explicitly require proof of a nexus to interstate commerce as an element of the offense. See United States v. Bass, 404 U.S. 336 (1971) (felony gun possession); Russell v. United States, 471 U.S. 858 (1985) (arson). FACE, like the Gun-Free School Zones Act, contains no such jurisdictional element.[6]

3. Going beyond Lopez

Because FACE neither regulates an economic activity nor contains a jurisdictional element, FACE apparently exceeds all prior exercises of congressional Commerce Clause authority. As Judge Coffey of the Seventh Circuit observed about FACE, "A federal statute that thus regulates p[u]rely non-commercial activity, while at the same time absent jurisdictional language, is unprecedented." United States v. Wilson, 73 F.3d at 692 (dissent).

The court below sought to avoid the logical conclusion -- that FACE exceeds the constitutional bounds of congressional

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[6]Congress could easily have chosen to follow the pattern of other federal criminal statutes by adding "in or affecting commerce," or similar language, to FACE. However, Congress chose not to do so. Hence, the constitutionality of a hypothetical amended FACE containing such language is not before this Court.

authority -- by adopting a novel, and deeply flawed, legal principle. The court held that Congress may regulate noncommercial activities (e.g., protest activities), without any jurisdictional language, if the regulated activities, aggregated as a whole, substantially affect an industry which involves, at least in part, interstate commerce. App. 6a-12a..

The implications of this new principle cannot be understated. This holding renders superfluous the jurisdictional language of countless federal statutes. Arson, gun possession by felons, indeed any criminal activity, in the aggregate, will substantially affect businesses which engage in interstate commerce. Hence, according to the court below, the language limiting the scope of these federal crimes to conduct specifically involving interstate commerce is wholly unnecessary. Cf. App. 11a-12a. For the same reason, Congress could pass a federal trespass, vandalism, or disorderly conduct statute (which, essentially, is what FACE represents). In all these cases, the regulated activity, viewed in the aggregate, substantially affects businesses involved in interstate commerce. Cf. App. 13a. Indeed, this principle has no logical limit. Virtually every human activity affects either goods, consumers, or providers which, taken as a whole, involve interstate commerce. If the court below is correct, nothing is beyond the purview of federal legislation under the Commerce Clause. As Judge Kosinski has remarked, "[One] wonder[s] why anyone would make the mistake of calling it the Commerce Clause instead of the `Hey, you-can-do-whatever-you-feel-like Clause.'" Kosinski, Introduction to Volume Nineteen, 19 Harv. J. L. & Pub. Pol'y 1, 5 (1995).

A rationale for Commerce Clause authority cannot be

accepted if the logic of that rationale would largely obliterate the distinction between state and federal power. Lopez, 115 S. Ct. at 1632-34. The Commerce Clause "may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." Id. at 1628-29 (internal quotation marks and citations omitted). For example, the argument that violent crime raises the cost of doing business, and therefore adversely affects commerce, would justify federal regulation of "not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce." Id. at 1632 (citation omitted). Therefore, that argument cannot justify FACE any more than it could justify the Gun-Free School Zones Act. "[I]f we were to accept the Government's arguments, we are hard-pressed to posit any activity by an individual that Congress is without power to regulate." Id.

The court below relied heavily upon congressional findings about the connection between anti-abortion protest and interstate commerce. However, "[s]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." Lopez, 115 S. Ct. at 1629 n.2 (internal quotation marks and citation omitted). "Whether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question . . . ." Id. (editing marks, quotation marks, and citation omitted).

The alleged nexus to interstate commerce which Congress identified -- some goods, staff, or patrons of some abortion facilities cross state lines, and the activities FACE restricts are both widespread and have negative effects on businesses, see App. 6a-8a -- applies with equal or greater force to virtually any business and any tortious or criminal activity.

If FACE is a constitutional exercise of congressional power to regulate interstate commerce, then the federal government has indeed crossed the Rubicon. Congress may, on this theory, regulate non-commercial, intrastate activity with no jurisdictional element tying the activity to interstate commerce.

FACE represents a tremendously significant attempted expansion of congressional power. This Court should grant review and rebuff this expansion as unconstitutional.

B. FACE Imposes Discriminatory, Vague, and Overbroad Restrictions on Expressive Activity.

The conflict with Lopez suffices to warrant review of the present case. But FACE also raises serious First and Fifth Amendment questions. This Court should therefore grant review to settle those constitutional questions as well.

With FACE, Congress consciously singled out the opponents of abortion for selectively harsh treatment. While protesters on other subjects or with other viewpoints receive slaps on the wrist, or even are lionized,[7] exclusively nonviolent

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[7]See, e.g., "Jackson Freed," USA Today, Feb. 12, 1997, p. 3A (Jesse Jackson only facing charge of disorderly conduct for "blocking access to [a Chicago] construction site" as part of a protest

pro-life demonstrators face a $10,000 fine and six months imprisonment for the first offense; subsequent offenses are felonies. See § 248(b). If FACE passes constitutional muster under the First and Fifth Amendments, then Congress (and the states, despite the Fourteenth Amendment) may likewise target other disfavored political and social movements for special restrictions and penalties.

This selectively harsh legislation, combined with vague and overbroad statutory language, raises important, substantial, and unsettled questions under the First and Fifth Amendment.

1. First Amendment rights are implicated.

There is no question that petitioners' expressive activities implicate First Amendment rights. Pro-life picketing and sidewalk counseling are core First Amendment activities. Schenck v. Pro-Choice Network of Western New York, No. 95-1065 (U.S. Feb. 19, 1996), slip op. at 18. Furthermore, "as a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment." Id. at 25 (internal quotation marks, editing marks, and citations omitted).

The First Amendment protects speech on political and social issues even if the speech is "intended to exercise a coercive impact" and is "offensive to others." Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971). Political expression having the effect of intimidation is constitutionally

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"for black truckers"; judge releasing Jackson "later shook Jackson's hand").

protected speech. NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982).[8] Political speech that creates an apprehension of fear is also constitutionally protected. Id. Moreover, if speech is offensive and emotionally unsettling, "that consequence is a reason for according it constitutional protection." Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd., 502 U.S. 105, 118 (1991) (internal quotations marks and citations omitted); Hustler Magazine v. Falwell, 485 U.S. 46, 55 (1988).

Moreover, protection of free speech "does not end at the spoken or written word." Texas v. Johnson, 491 U.S. 397, 404 (1989). The Constitution protects any conduct that may be "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments." Spence v. Washington, 418 U.S. 405, 409 (1974). See, e.g., Texas v. Johnson (burning a flag); Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969) (wearing of black armband); R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (cross burning).

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[8]As this Court stated over twenty years ago, "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 505 (1969). Only advocacy "directed to inciting or producing imminent lawless action" and "likely to incite or produce such action" is unprotected. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

2. FACE is a viewpoint-based ban on speech.

This Court has held that any viewpoint discrimination against speech is unconstitutional. Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384, 394 (1993); R.A.V. v. City of St. Paul, 505 U.S. 377 (1992). The government may not "impose special prohibitions on those speakers who express views on disfavored subjects," R.A.V., 505 U.S. at 391.

It is abundantly clear that FACE is viewpoint-based, and therefore unconstitutional. In its restrictions on "intimidation," "physical obstruction," blocking of access to medical buildings, or vandalism, FACE targets only those who act "because [a] person is . . . obtaining or providing reproductive health services," Sec. 284(a)(1), or "because [a] facility provides reproductive health services," Sec. 248(a)(3). FACE thus discriminates against anti-abortion protest activity while leaving untouched pro-abortion protests and protests on other subjects.

Indeed, the legislative history is rather explicit on this point:

> Thus, for example, if an environmental group blocked passage to a hospital where abortions happen to be performed, but did so as part of a demonstration over harmful emissions produced by the facility, the demonstrators would not violate this Act (though their conduct might violate some other law, such as local trespass law). In that example, the demonstrators' motive is related to the facility's emissions policy and practices and not to its policy and practices on abortion-related services.

S. Rep. No. 117, 103rd Congress, 1st Sess. 24 (1993) (emphasis added).

Concrete examples further illustrate this lack of viewpoint neutrality. Consider the case of a multi-tenant medical center with three entrances. At one entrance, animal rights activists block the door to halt mistreatment of laboratory animals at a research lab inside the center. At a second entrance, labor union members hold a sit-down strike blocking the door to protest unfair wages for maintenance workers in the center. At a third entrance, anti-abortion activists conduct a "sit-in" to prevent the practice of abortion at a facility inside the center. FACE only applies to the anti-abortion activists. See Sec. 248(a)(1). Consider a freestanding abortion center in an inner-city location. A teenager, outraged that his girlfriend aborted their child, spray paints "DEATH CAMP" on the side of the building. Another teenager, who belongs to a gang called "Warriors," spray paints "WARRIORS RULE" on the same building. FACE only applies to the anti-abortion graffiti writer. See Sec. 248(a)(3). Consider an abortion facility where pro-abortion escorts gather outside in order to hamper anti-abortion "sidewalk counseling." A woman walks up the sidewalk, and an anti-abortion counselor approaches to offer literature and information. A pro-abortion escort then physically blocks the anti-abortion counselor and shoves the counselor aside. The counselor then shoves the escort back. FACE only applies to the anti-abortion counselor. See Sec. 248(a)(1).

This glaringly selective imposition of legal restrictions on the basis of viewpoint clearly violates the First Amendment. For instance, this Court has held that government may forbid all use of public school premises after hours, but may not forbid use only by those who wish to address a topic from a religious

viewpoint. Lamb's Chapel v. Center Moriches Union Free School Dist. Government may forbid all arson in certain locales, but may not forbid only burning a flag to desecrate it. Texas v. Johnson. Government may forbid all trespass and vandalism at facilities, but may not forbid only trespass and vandalism in the name of racial bigotry. R.A.V. v. City of St. Paul. Government may forbid all targeted, single-residence residential picketing, Frisby v. Schultz, 487 U.S. 474 (1988), but may not forbid only nonlabor residential picketing. Carey v. Brown, 447 U.S. 455 (1980). See also Schacht v. United States, 398 U.S. 58, 62-63 (1970) (invalidating a law that allowed wearing military uniforms only in dramatic portrayals that did not "tend to discredit" the military). FACE violates the basic constitutional principle of neutrality, "which requires the democratic majority to accept for themselves and their loved ones what they impose on you and me." Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 300 (1990) (Scalia, J., concurring).[9]

It is true that FACE also would proscribe pro-abortion blockades at pro-life pregnancy centers. But to say that FACE is viewpoint-neutral because it covers this counterfactual, hypothetical scenario is like saying a ban on pollution-related protests is viewpoint-neutral because it would also ban pro-pollution protests. Such an argument is plainly pretextual.

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[9]This principle finds embodiment both in the free speech guarantee of the First Amendment and in the right to equal protection under the Fifth and Fourteenth Amendments. See R.A.V., 505 U.S. at 384 n.4; Police Dep't v. Mosley, 408 U.S. 92 (1972); Carey v. Brown.

More fundamentally, the pregnancy center hypothetical simply shows that FACE's viewpoint-discrimination can apply in other settings beyond abortion facilities. At pregnancy centers, environmental protesters, labor protesters, and supporters of the center are not covered, while pro-abortion protesters are. Thus, whether at an abortion center or at a crisis pregnancy center, FACE targets one particular viewpoint -- namely, those opposing the center's abortion (or pregnancy aid) practice -- thereby unconstitutionally "licens[ing] one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules." R.A.V., 505 U.S. at 392.[10]

3. FACE is unconstitutionally vague and overbroad.

FACE also suffers from unconstitutional vagueness and overbreadth.

"First Amendment freedoms need breathing space to survive." NAACP v. Button, 371 U.S. 415, 433 (1963). As a result, "the First Amendment recognizes that a certain amount of expressive disorder not only is inevitable in a society committed to individual freedom, but must itself be protected if that freedom would survive." City of Houston v. Hill, 482 U.S. at 472. When a law lacks clearly defined prohibitions,

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[10]The addition to FACE of language that extends its prohibitions and punishments to unlawful protest activities at places of religious worship, as well as at abortion facilities, does not redeem the law. Sec. 248(a)(2) and (3). A law penalizing two viewpoints is no less unconstitutional than a law penalizing just one viewpoint. See R.A.V. (ordinance applied to religious bigotry as well as racial bigotry).

that law unconstitutionally threatens speech through the twin vices of vagueness and overbreadth. FACE is both vague and overbroad.

a. vagueness

The text of FACE -- set forth in an appendix --raises a host of interpretive difficulties that engender unconstitutional vagueness, as well as overbreadth.

-- "Force or Threat of Force": Does this include a nonviolent "sit-in"? Calling someone a murderer? Warning someone that he may go to Hell? Sec. 248(a)(1).

-- "Physical Obstruction": What does it mean to render passage to or from a facility "unreasonably difficult"? Sec. 248(e)(4). Is it "unreasonably difficult" to walk through a picket line? Be forced to walk around a persistent sidewalk counselor? Step over people engaged in a "sit-in"? Wait twenty minutes while police arrest participants in a "rescue" blockade?[11]

-- "Injures": FACE says "injures" in section 248(a) but elsewhere refers to "bodily injury," Sec. 248(b). Therefore, the verb "injures" standing alone apparently includes causing other, non-bodily injuries. Does this include any legal injury?

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[11]This Court has held that the Constitution affords persons the opportunity to win the attention of the listener. Kovacs v. Cooper, 336 U.S. 921 (1949). If "physical obstruction" means merely being forced to walk around a pro-life leafletter, it is plainly unconstitutional. Lee v. ISKCON, 505 U.S. 830 (1992) (ban on leafletting in airport terminal violates First Amendment).

Emotional injury? Injury to constitutional rights?

-- "Intimidates": The phrase "reasonable apprehension of bodily harm to him- or herself or to another" opens up a range of possible meanings. Sec. 248(e)(3). If FACE had defined "intimidate" to mean "to place a person in reasonable apprehension of imminent bodily harm from the actor to him or herself," it would approximate the concept of assault. See 6 Am. Jur. 2d Assault and Battery § 3 (1963). FACE, however, departs markedly from this concept: first, the threatened harm need not be imminent; second, the threatened harm need not come from the person allegedly violating FACE; third, the threatened harm may be to another person other than the one in reasonable apprehension of the harm.

These features of FACE yield a drastically broadened concept of "intimidation." FACE criminalizes anti-abortion "threats" if they "intimidate" by placing another person in reasonable apprehension of harm sometime to someone from something.

The breadth of this definition is astonishing. Warning any listener of the physical perils of abortion will, if persuasive, likely induce reasonable apprehension of bodily harm to those seeking abortion. Merely saying, "If you (or your friend, wife, daughter, etc.) have an abortion, you may die (or become sterile, hemorrhage, get infections, get breast cancer, etc.)" could, especially if backed up with medical statistics or personal accounts, induce "reasonable apprehension of bodily harm" to someone. True, the apprehension comes from the medical information. True, the harm feared may or may not be imminent. True, the harm feared would come from the

abortion, not the sidewalk counselor. True, the harm may be to someone else. But FACE takes none of these factors into consideration. "Threatening" the medical harms of abortion triggers the literal language of FACE.

-- "Interfere With": FACE defines this term as "restrict[ing] a person's freedom of movement." Sec. 248(e)(2). But by merely existing and occupying space, everyone necessarily "restricts the freedom of movement" of everyone else by diminishing the space available for movement. While a literal interpretation of this text is clearly absurd, where is the line to be drawn?

The vagueness of FACE has terribly grave practical significance. Those who wish lawfully to distribute literature or speak to passersby about abortion alternatives must act at their peril when present outside abortion facilities. Indeed, this problem is multiplied by the sheer enormity of the penalties attached to guessing wrongly -- up to six months in prison for a single nonviolent violation and eighteen months (i.e., a felony) for second or subsequent nonviolent offenses, to say nothing of civil remedies and attorneys fees. Sec. 248 (b) and (c). Compounding this problem is the fundamental bias of FACE: this one-way statute weighs down only upon anti-abortion activities, removing the moderating influence that would result from equal applicability of the legal norms.

b. overbreadth

FACE's overbreadth is amply illustrated in the preceding section.

FACE is also overbroad because it is not geographically limited. It purports to protect access to abortion facilities because of problems arising at those locations, yet restricts communicative activities without regard to any proximity to such facilities. E.g., Lucero v. Trosch, 904 F. Supp. 1336 (S.D. Ala. 1995) (FACE civil suit predicated on remarks made on "Geraldo" TV show). Nor is FACE limited temporally, i.e., to interference with specific, impending abortions. Id.

Given the extraordinary penalties and civil remedies available to punish violations, FACE doubtless has a severe chilling effect on entirely lawful (indeed, constitutionally protected) anti-abortion expression at abortion facilities. In this context, the substantial overbreadth of FACE's prohibitions render it unconstitutional. See Board of Airport Comm'rs v. Jews for Jesus, 482 U.S. 569, 574 (1987); Houston v. Hill, 482 U.S. at 458-59; New York v. Ferber, 458 U.S. 747, 769 (1982).

## CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,


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March 10, 1997

# APPENDICES

# APPENDIX A

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 7, 1996 Decided December 10, 1996

No. 95-5419

RANDALL A. TERRY, ET AL.,
APPELLANTS

v.

JANET RENO, ATTORNEY GENERAL OF THE
UNITED STATES OF AMERICA, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 94cv01154)

*Mark N. Troobnick* argued the cause for appellants. With him on the brief were *Jay A. Sekulow, Colby M. May* and *James M. Henderson, Sr.*

*Sushma Soni,* Attorney, U.S. Department of Justice, argued the cause for appellees. With her on the brief were *Frank W. Hunger,* Assistant Attorney General, *Eric H. Holder, Jr.,* U.S. Attorney, and *Mark B. Stern,* Attorney.

*Celeste Lacy Davis* and *John Vanderstar* were on the brief for intervenor-appellees.

Before: WILLIAMS, SENTELLE and TATEL, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* TATEL.

TATEL, *Circuit Judge*: In this case, anti-abortion protesters challenge the constitutionality of the Freedom of Access to Clinic Entrances Act. Enacted in 1994, that statute prohibits the use or threat of force or physical obstruction against a

person seeking to obtain or provide reproductive health services, including abortions. Agreeing with the district court and joining four of our sister circuits, we sustain the constitutionality of the Access Act. Because the legislative record contains sufficient findings to conclude that violent and obstructive protest activities substantially affect interstate commerce in reproductive health services, Congress did not exceed its commerce power in enacting the statute. The Access Act also does not violate the First Amendment. It prohibits conduct, not speech, and its prohibition is narrowly tailored to further the Government's legitimate interest in providing safe access to reproductive health services.

I

Reacting to a nationwide pattern of blockades, vandalism, and violence aimed at abortion clinics and their patients and employees, Congress enacted the Freedom of Access to Clinic Entrances Act. 18 U.S.C. § 248 (1994). Referred to throughout this opinion as the Access Act, the statute provides:

> (a) Prohibited Activities.--Whoever--
>
> (1) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with . . . any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services;
>
> . . . .
>
> (3) intentionally damages or destroys the property of a facility, or attempts to do so, because such facility provides reproductive health services . . .

> shall be subject to [criminal penalties and civil remedies], except that a parent or legal guardian of a minor shall not be subject to any penalties or civil remedies under this section for such activities insofar as they are directed exclusively at that minor.

18 U.S.C. § 248. According to the Access Act's rules of construction, nothing in it "shall be construed . . . to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment to "the Constitution . . . ." *Id.* § 248(d)(1). The statute also defines the terms "interfere with," "intimidate," "physical obstruction," and "reproductive health services." *Id.* § 248(e)(2)-(5). "Physical obstruction," for example, means "rendering impassable ingress to or egress from a facility that provides reproductive health services . . . or rendering passage to or from such a facility . . . unreasonably difficult or hazardous." *Id.* § 248(e)(4). Criminal penalties under the Access Act vary depending on whether the offense was nonviolent or violent, and whether the offender was a first-time violator or a repeat offender. *Id.* § 248(b).

On May 26, 1994, the day the President signed the Access Act into law, appellants filed suit in the United States District Court for the District of Columbia challenging the constitutionality of the Act both on its face and "as applied or threatened to be applied" to them. Appellants are anti-abortion activists from New York, Virginia, Ohio, and the District of Columbia, whose protest activities take place in the District of Columbia and elsewhere in the United States. Compl. at 3-5. Appellants picket abortion clinics, distribute literature, offer "sidewalk counseling" to women entering abortion facilities, and lead anti-abortion protesters in public prayer and slogan

chanting. *Id.* at 6-9. Several appellants participated in "sit-ins," which "did have the effect, temporarily, of interfering with and blocking access to abortion facilities." *Id.* at 9. According to five of the six appellants, protesting against abortion "serves a higher and more compelling purpose than that served by traditional laws against trespass and blocking access to abortion facilities." *Id.* at 8.

The district court granted the Government's motion for judgment on the pleadings pursuant to FED. R. CIV. P. 12(c). Finding that the statute "'protects and regulates commercial enterprises operating in interstate commerce,'" the court ruled that Congress had the power to enact the statute under the Commerce Clause. *Terry v. Reno,* Civ. No. 94-1154, slip op. at 11 (D.D.C. Nov. 21, 1995) (quoting *Cheffer v. Reno,* 55 F.3d 1517, 1520 (11th Cir. 1995)). Relying on *American Life League, Inc. v. Reno,* 47 F.3d 642 (4th Cir.), *cert. denied,* 116 S. Ct. 55 (1995), the district court held that because the Access Act was viewpoint-neutral and narrowly tailored to further substantial government interests, it did not violate the First Amendment. *Terry,* slip op. at 5-8. The district court also ruled that the Act did not violate principles of due process or equal protection, that it did not violate the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb *et seq.* (1994), and that plaintiffs' Eighth Amendment claims were not ripe for review. *Id.* at 9-13.

In their "Statement of the Issues," appellants list nine challenges to the Access Act. Appellants' Br., at vi. By failing to brief five of these challenges, they have waived them. *See* FED. R. APP. P. 28(a)(6); *Democratic Cent. Comm. v. Washington Metro. Area Transit Comm'n,* 485 F.2d 786, 790 n.16 (D.C. Cir. 1973) (where petitioners offer "no argument

whatever" in support of certain issues on appeal, court will decline to consider them). Rule 28(a)(6) requires that the argument section of an appellate brief "contain the contentions of the appellant on the issues presented, and the reasons therefor . . . ." FED. R. APP. P. 28(a)(6). Simply listing the issues on review without briefing them does not preserve them. *Cratty v. United States*, 163 F.2d 844, 851 (D.C. Cir. 1947) (where certain grounds for appeal are "stated by the appellants but not urged in their brief," they are treated as abandoned). We therefore address only the arguments appellants have briefed: that the Access Act exceeds Congress's commerce power; that it abridges appellants' First Amendment rights; that it violates the Equal Protection Clause; and that the district court erred in granting the Government's motion for judgment on the pleadings.

II

Appellants' Commerce Clause challenge rests on the Supreme Court's recent decision in *United States v. Lopez*, 115 S. Ct. 1624 (1995). There, the Court struck down the Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q) (1994), which made possession of a gun within a school zone a federal offense. Of the three categories of activity the Court held that Congress could regulate pursuant to its Commerce Clause authority, only the third is relevant to this case: Congress can regulate activities if it has a rational basis for concluding that they "substantially affect interstate commerce." *Lopez*, 115 S. Ct. at 1630. The *Lopez* Court found that possession of guns within school zones was not commercial in nature, that the statute did not contain a jurisdictional element to ensure on a case-by-case basis that the gun in question was connected with interstate commerce, and that Congress had made no findings

about the effect gun possession in school zones has on interstate commerce. *Id.* at 1630-32. The Court then considered and rejected the Government's arguments, developed only after the statute's constitutionality was challenged in court, linking the possession of guns near schools to interstate commerce. *Id.* at 1632-33. Because it could not conclude that Congress had a rational basis for finding that gun possession within school zones had a substantial effect on interstate commerce, the Court declared the statute unconstitutional. *Id.* at 1634.

*Lopez*'s impact on the limits of the commerce power is a hotly debated issue. Because the Access Act does not test those limits, we need not enter that fray. Indeed, we can begin where the *Lopez* Court could not—with congressional findings regarding the effect on interstate commerce of anti-abortion violence and blockades of abortion clinics.

Although no interstate commerce findings appear in the text of the statute, we consider "even congressional committee findings" regarding the effect on interstate commerce of the regulated activity. *Lopez*, 115 S. Ct. at 1631; *see, e.g.*, *Preseault v. ICC*, 494 U.S. 1, 17 (1990) (citing House Report in discussion of congressional findings regarding effect on interstate commerce of federal "rails-to-trails" statute). The Senate Committee on Labor and Human Resources, which held hearings on anti-abortion violence and drafted the bill that ultimately became the Access Act, concluded that for several reasons abortion clinics do engage in interstate commerce: they obtain medical equipment and supplies through interstate commerce, they treat patients who travel interstate to obtain services, their employees travel interstate, and they own and lease office space and generate income. S. REP. NO. 103-117, at 31 (1993).

Having concluded that abortion clinics engage in interstate commerce, the Committee also documented the effect violent and disruptive anti-abortion protest activities have on clinics and their operations. According to the Senate Report:

> A nationwide campaign of anti-abortion blockades, invasions, vandalism and outright violence is barring access to facilities that provide abortion services and endangering the lives and well-being of the health care providers who work there and the patients who seek their services. This conduct is interfering with the exercise of the constitutional right of a woman to choose to terminate her pregnancy, and threatens to exacerbate an already severe shortage of qualified providers available to perform safe and legal abortions in this country.

*Id.* at 3. The Report chronicled escalating violence against abortion providers and clinics, including eighty-four assaults, thirty-six bombings, eighty-one arsons, seventy-one chemical attacks, 131 death threats, two kidnappings, 327 clinic invasions, over 6,000 blockades, and—as of 1993—one murder. *Id.* at 3-11. According to the Committee, protester violence and blockades forced temporary or permanent closure of abortion facilities, causing doctors to refuse to perform abortions and producing a scarcity of both clinics and physicians. *Id.* at 14-17. The number of doctors providing abortion services declined in thirty-four states between 1985 and 1988. *Id.* at 17 n.29. Some doctors traveled to several states, some for hundreds of miles, to perform abortions at clinics which had no physicians of their own. *Id.* at 31 & n.46. Patients, too, sometimes traveled hundreds of miles to obtain abortions, either within their states or at clinics in other states. *Id.* at 31. The Committee also found that in some rural areas,

arson and chemical attacks had forced medical clinics to stop providing not only abortions, but other reproductive services as well, including pre- and post-natal care. *Id.* at 5-6.

According to the Committee, some anti-abortion organizations engaged in concentrated nationwide campaigns against abortion clinics and physicians providing abortions. *Id.* at 11-14. Relying on statements of those groups' leaders, the Committee concluded that clinic blockades, threats against employees, and other violent and obstructive activities have a single goal: to eliminate the practice of abortion by closing abortion clinics. *Id.* at 11.

Although this legislative record amply supports Congress's finding that the activities of anti-abortion activists affect interstate commerce, this conclusion does not end our analysis; *Lopez* holds that the effect on interstate commerce must be "substantial." *Lopez*, 115 S. Ct. at 1630. As the Court acknowledged, the standard was not always so demanding: "[O]ur case law has not been clear whether an activity must 'affect' or 'substantially affect' interstate commerce in order to be within Congress' power to regulate it . . . ." *Id.* In one case, the Court described the standard this way:

> The task of a court that is asked to determine whether a particular exercise of congressional power is valid under the Commerce Clause is relatively narrow. The court must defer to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such a finding.

*Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 276 (1981) (citing *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964), and *Katzenbach v. McClung*, 379 U.S. 294, 303-04 (1964)); *see also Preseault*,

494 U.S. at 17 ("[W]e must defer to a congressional finding that a regulated activity affects interstate commerce 'if there is any rational basis for such a finding.'" (quoting *Hodel*)).

We think it obvious that Congress's failure to use the magic word "substantial" is not fatal to the statute's constitutionality. For one thing, since Congress passed the Access Act prior to *Lopez*, it understandably did not find that activities proscribed by the statute "substantially" affect interstate commerce; it simply found that those activities "affect" interstate commerce. S. REP. NO. 103-117, at 31. Moreover, if Congress "normally is not required to make formal findings" as to the burdens that particular activities place on interstate commerce, *Lopez*, 115 S. Ct. at 1631, then Congress surely need not make formal findings that the activities "substantially" affect interstate commerce. Just as we can examine the legislative history to assure ourselves that Congress made findings regarding the impact of anti-abortion activities on interstate commerce, *supra* at 6-7, we can, as appellants' counsel conceded at oral argument, examine those findings to assure ourselves that the impact is substantial. In light of the Senate Report's detailed review of the effect violent and obstructive anti-abortion protest has had upon the availability of abortions nationwide, we have no doubt that Congress found the impact of such activities on interstate commerce to be substantial.

Appellants argue that the Access Act regulates not abortion clinics, but *protest* against abortion clinics, and that Congress may not regulate protest under the Commerce Clause. Although two circuits have found that the Act does in fact regulate the provision of reproductive health services, *United States v. Wilson*, 73 F.3d 675, 683 (7th Cir. 1995) (Act regulates provision of health services "by preventing its

obstruction"), *cert. denied*, 117 S. Ct. 47 (1996); *Cheffer v. Reno*, 55 F.3d at 1520 (unlike statute challenged in *Lopez*, Access Act "does regulate commercial activity, the provision of reproductive health services"), we need not address that issue. As counsel conceded at oral argument, Congress has authority to regulate "*activities* that substantially affect interstate commerce." *Lopez*, 115 S. Ct. at 1630 (emphasis added). The regulated activity—in this case, interfering with abortion clinics—need not be commercial, so long as its effect on interstate commerce is substantial. As the Supreme Court said in a different context, "An enterprise surely can have a detrimental influence on interstate or foreign commerce without having its own profit-seeking motives." *National Org. for Women, Inc. v. Scheidler*, 114 S. Ct. 798, 804 (1994). Like the Eleventh Circuit, we find no support for "the proposition that Congress' Commerce Clause authority extends only to the regulation of commercial actors, and not private individuals who interfere with commercial activities in interstate commerce." *Cheffer*, 55 F.3d at 1520 n.6; *see also United States v. Dinwiddie*, 76 F.3d 913, 920 (8th Cir. 1996) (same), *petition for cert. filed* (U.S. Aug. 16, 1996) (No. 96-5615); *Wilson*, 73 F.3d at 684-85 (same).

We can quickly dispose of appellants' remaining Commerce Clause challenges. Although they may be correct that, by itself, interstate travel by patients and staff is insufficient to justify finding that clinic operations affect interstate commerce, their reliance on *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753 (1993), is misplaced. *Bray*'s holding that anti-abortion protest does not implicate the constitutional right to interstate travel, *id.* at 762-63, is irrelevant to the inquiry in this case, i.e., whether patients in fact travel interstate to obtain abortions. In fact, the *Bray* Court's implicit acceptance of the district court's

findings that substantial numbers of women traveled interstate to have abortions reinforces the congressional findings underlying the Access Act. *Id.* at 762. In any event, travel by patients and staff was not the Committee's only finding regarding whether abortion clinics operate in interstate commerce. The Committee also found that clinics purchase equipment and supplies in interstate commerce, own and lease office space, and generate income. S. REP. NO. 103-117, at 31. Combined with such findings, the interstate travel of patients and staff supports the conclusion that the Access Act does not exceed Congress's Commerce Clause power.

Appellants' argument that the "decrease in the number of abortions" is insufficient to justify the statute ignores the critical fact: the marked decrease in the *availability* of abortions nationwide, a decrease Congress attributed both to the forced closure of clinics by blockades or violence, and to the decreasing number of physicians willing to perform abortions because of protesters' threats. "It is this *threat to a national market,*" the Seventh Circuit observed, "which Congress found to be scarce and declining in availability, that distinguishes Congress's authority to regulate in this case from its probable lack of authority to regulate, for example, shoplifting . . . ." *Wilson,* 73 F.3d at 682 (emphasis added).

Aside from their unsuccessful challenges to the congressional findings, appellants' only other Commerce Clause argument is that the Access Act is invalid because it lacks a jurisdictional element. We do not view *Lopez* as holding that federal criminal statutes must contain jurisdictional elements. If a jurisdictional element were critical to a statute's constitutionality, the Court in *Lopez* would not have gone on to examine the Government's proffered rationales for the

constitutionality of the gun possession statute. *See Lopez*, 115 S. Ct. at 1632-34. *Lopez*'s fundamental proposition is that Congress must ensure that its Commerce Clause power to regulate non-commercial activities extends to only those activities that substantially affect interstate commerce. Congress may do so either through its own legislative findings or by including a jurisdictional element in the statute; it need not do both. Where, as here, detailed congressional findings support the conclusion that the activities prohibited by the Access Act substantially affect interstate commerce, the absence of a jurisdictional element is not fatal to the statute's constitutionality. *See Wilson*, 73 F.3d at 685 ("In discussing the lack of a jurisdictional element in *Lopez*, the Court simply did not state or imply that all criminal statutes must have such an element, or that all statutes with such an element would be constitutional, or that any statute without such an element is per se unconstitutional.").

In concluding that the Access Act satisfies *Lopez*, we think it significant that the statute fundamentally differs from the statute struck down in *Lopez*. The Access Act prohibits activities—force, threats, physical obstruction of access to or from reproductive health facilities, and physical damage to those facilities. The statute invalidated in *Lopez* did not prohibit active interference of this sort, but rather simple possession of a gun near a school. This difference is telling. As the Court explained in *Lopez*, in order to justify the constitutionality of prohibiting gun possession near schools, the Government had to engage in several multi-step analyses to link gun possession to interstate commerce: (1) gun possession near schools leads to gun use, which in turn leads to violent crime, which in turn imposes substantial costs on society, which in the end affects interstate commerce; and (2) gun possession near schools

threatens the educational environment, which hampers the educational process, which creates a "less productive citizenry," which adversely affects "the Nation's economic well-being," and which in the end adversely affects interstate commerce. *Lopez*, 115 S. Ct. at 1632. In the case before us, the chain connecting the prohibited activity and interstate commerce contains only one link: violent and obstructive activity outside abortion clinics adversely affects interstate commerce in reproductive health services. In enacting the Access Act, Congress did not exceed its Commerce Clause power.

III

We turn to appellants' First Amendment challenges to the Act. Applying long-standing Supreme Court precedents, we find the statute compatible with the First Amendment.

To begin with, the Access Act does not target protected speech. It prohibits three types of conduct: use of force, threat of force, and physical obstruction. In this sense, the Access Act is virtually identical to the statute upheld in *United States v. O'Brien*, 391 U.S. 367 (1968), which also punished conduct—the destruction of draft cards. Moreover, the Supreme Court has ruled that the Government can punish all three types of conduct covered by the Access Act without running afoul of the First Amendment. The first, physical assault, "is not by any stretch of the imagination expressive conduct protected by the First Amendment." *Wisconsin v. Mitchell*, 508 U.S. 476, 484 (1993). Threats are not protected speech either. *Madsen v. Women's Health Ctr., Inc.*, 114 S. Ct. 2516, 2529 (1994) ("Threats to [clinic] patients or their families, however communicated, are proscribable under the First Amendment."). Consistent with the First Amendment, the Government may also punish physical obstruction that makes

passage to or from a reproductive health facility impossible or unreasonably hazardous. *Cameron v. Johnson*, 390 U.S. 611, 617 (1968). Protesters have no First Amendment right to "cordon off a street, or [the] entrance to a public or private building, and allow no one to pass who did not agree to listen to their exhortations." *Cox v. Louisiana*, 379 U.S. 536, 555 (1965). Going "beyond protest," such activity "invade[s] property rights." *United States v. Soderna*, 82 F.3d 1370, 1375 (7th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3086 (July 26, 1996) (No. 96-141). *O'Brien*, *Mitchell*, *Madsen*, and *Cox* thus squarely govern this case.

That conduct prohibited by the Access Act might have expressive value, such as in the case of sit-ins which "temporarily . . . interfer[e] with and block[ ] access to abortion facilities," *see* Compl. at 9, does not alter our conclusion regarding the Act's constitutionality. Congress may regulate conduct with expressive content without running afoul of the First Amendment if the legislation "furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *O'Brien*, 391 U.S. at 377. The Access Act meets this standard.

The statute furthers several important government interests, not the least of which are ensuring access to lawful health services and protecting the constitutional right of women seeking abortions and other pregnancy-related treatment. As in *O'Brien*, the Government's interest is unrelated to the suppression of free expression. The statute at issue in *O'Brien* prohibited destroying draft cards, not destroying draft cards by anti-war protesters. Here the statute prohibits interfering with

reproductive health services, not interfering with those services by anti-abortion demonstrators. The statute therefore "condemns only the independent noncommunicative impact of conduct within its reach." *Id.* at 382. Moreover, the Act protects individuals providing and obtaining "reproductive health services," not just abortions. The statute defines "reproductive health services" to include "medical, surgical, counselling or referral services relating to the human reproductive system, including services relating to pregnancy or the termination of a pregnancy." 18 U.S.C. § 248(e)(5). The Access Act thus does not play favorites: it protects from violent or obstructive activity not only abortion clinics, but facilities providing pre-pregnancy and pregnancy counseling services, as well as facilities counseling alternatives to abortion. *See Riely v. Reno*, 860 F. Supp. 693, 702 (D. Ariz. 1994) (Access Act "would apply to an individual who spray paints the words 'KEEP ABORTION LEGAL' on a facility providing counseling regarding abortion alternatives as well as to the individual who spray paints the words 'DEATH CAMP' on a facility providing abortion services."). Because the Act criminalizes only violent or obstructive conduct against reproductive health facilities or those seeking to obtain or provide reproductive health services, the views of those arrested for committing violence against or obstructing people obtaining or providing reproductive health services are irrelevant.

That the majority of those whose conduct the statute punishes probably oppose abortion does not call the statute's neutrality into question. In *O'Brien*, the Court upheld a law prohibiting willful destruction of draft cards even though most people destroying their draft cards opposed the Vietnam War. There is, after all, "no disparate-impact theory in First Amendment law." *Dinwiddie*, 76 F.3d at 923. Appellants

"cannot obtain constitutional immunity from prosecution by violating a statute more frequently than any other group." *Soderna*, 82 F.2d at 1376 (citing *Madsen*, 114 S. Ct. at 2523-24).

The Access Act survives *O'Brien*'s third inquiry: the statute is narrowly tailored to further the Government's interests. As the Eighth Circuit put it in *Dinwiddie*, the statute merely "forbids physical interference with people going about their own lawful private business." *Dinwiddie*, 76 F.3d at 924. The Act also leaves open ample alternative means for communication: "In a non-violent, non-obstructive manner, protestors may still stand outside reproductive health facilities and express their anti-abortion message. They may still proclaim their views and make their pleas by voice, signs, handbills, symbolic gestures and other expressive means." *American Life League*, 47 F.3d at 652 (footnote omitted).

Our conclusion that the Access Act satisfies the *O'Brien* test might be different if, notwithstanding the Act's clear focus on conduct, the Government were using it to prosecute appellants for their First Amendment activity. But this is not such a case. Appellants' complaint does not allege that defendants applied the Act to them or their protest activities, nor have they amended the complaint to include such allegations. Indeed, they filed their complaint on the day the Access Act was signed into law.

The statute's motive requirement—that a person violates the Act by engaging in proscribed conduct "because" a person is obtaining or providing reproductive health services—is not, as appellants claim, fatal to its constitutionality. Again, *Wisconsin v. Mitchell* controls. The statute at issue in that case enhanced the sentence for aggravated battery if the aggressor

"'intentionally select[ed]'" his victim on the basis of his "'race, religion, color, disability, sexual orientation, national origin or ancestry . . . .'" *Mitchell*, 508 U.S. at 480 (quoting Wis. Stat. § 939.645(1)(b) (1989-1990)). The Wisconsin Supreme Court had invalidated the statute because, in its view, the law criminalized bigoted thought—it "'punishe[d] the 'because of' aspect of the defendant's selection, the *reason* the defendant selected the victim, the *motive* behind the selection.'" *Id.* at 482 (quoting *Mitchell v. Wisconsin*, 485 N.W.2d 807, 812 (1992)). Reversing, the Supreme Court found that motive "plays the same role under the Wisconsin statute as it does under federal and state antidiscrimination laws," which the Court has consistently upheld against constitutional challenge. *Mitchell*, 508 U.S. at 487 (citing *Roberts v. United States Jaycees*, 468 U.S. 609, 628 (1984) (no First Amendment right to discriminate in membership of charitable organization on basis of sex in violation of state antidiscrimination law); *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984) (no First Amendment right to discriminate in hiring on basis of sex in violation of Title VII); *Runyon v. McCrary*, 427 U.S. 160, 176 (1976) (no First Amendment right to discriminate on basis of race in selecting who may attend a private school)). The *Mitchell* Court distinguished the ordinance invalidated in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), from the Wisconsin statute it upheld, pointing out that the former explicitly targeted expression—"'fighting words' that insult, or provoke violence, 'on the basis of race, color, creed, religion, or gender'"—while the Wisconsin statute targeted conduct unprotected by the First Amendment. *Mitchell*, 508 U.S. at 487. Nothing distinguishes the case before us today from *Mitchell*. Like the statute in *Mitchell*, the Access Act targets not expression, but conduct. As the Court recognized in *R.A.V.*, "here the government does

not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy." *R.A.V.*, 505 U.S. at 390. The Act's motive requirement, as with similar requirements in other federal statutes, *see, e.g.*, 42 U.S.C. § 3631 (1994) ( Fair Housing Act provision prohibiting use or threat of force against person because he or she participates in certain housing programs); 42 U.S.C. § 1971(b) (1994) (Voting Rights Act provision stating that no person shall threaten another for the purpose of interfering with his or her right to vote), does not make the Access Act an instrument for the suppression of speech. It merely narrows the Act's reach.

Remaining are appellants' claims that the Access Act is overbroad and vague. A statute is overbroad only if "it reaches a substantial number of impermissible applications." *New York v. Ferber*, 458 U.S. 747, 771 (1982); *see City of Houston v. Hill*, 482 U.S. 451, 458 (1987) ("Only a statute that is substantially overbroad may be invalidated on its face."). Contrary to appellants' argument, the Access Act prohibits only a narrow range of conduct: the use or threat of force, or nonviolent physical obstruction, intended to prevent access to or the provision of reproductive health services. Moreover, the statute contains language barring its application to expressive conduct protected by the First Amendment, such as picketing or other peaceful demonstration. 18 U.S.C. § 248(d)(1). Appellants suggest two allegedly impermissible applications of the statute:

> [The Access Act] criminalizes 'threats' that the person who is uttering the 'threat' will harm *himself* if another person obtains or provides an abortion. Sec. 248(e)(3) (definition of 'intimidate'). [The Access Act] therefore criminalizes a

> genuine threat to go on an extended 'hunger strike'—i.e., risk 'bodily harm' to oneself—if another person obtains or provides an abortion. Under section 248(a)(1) and (e)(3), such a 'threat' would constitute criminal intimidation because it would 'place a person in reasonable apprehension of bodily harm . . . *to another.*' [The Access Act's] definition of 'intimidation' would also include the 'harm' of increased medical risk—a harm abortion advocates claim is inherent in *any* delay or denial of abortion (even by voluntary choice of childbirth).

Appellants' Br., at 37. When judged in relation to the statute's plainly legitimate sweep," neither of these examples renders the statute overbroad. *Broadrick v. Oklahoma,* 413 U.S. 601, 615 (1973).

We are equally unpersuaded by appellants' vagueness challenge. A statute is unconstitutionally vague if it does not give a "person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972). In arguing that the terms "interfere with" and "intimidate" are vague, appellants ignore the statute's explicit definition of these terms. "Interfere with" means "to restrict a person's freedom of movement." 18 U.S.C. § 248(e)(2). "Intimidate" means "to place a person in reasonable apprehension of bodily harm to him- or herself or to another." *Id.* § 248(e)(3). Because the Supreme Court has held that the term "'unreasonably interfere' plainly require[s] no 'guess[ing] at [its] meaning,'" *Cameron,* 390 U.S. at 616, we fail to see how the term "interfere with," confined as it is by the narrow definition in the statute, could possibly be vague. We agree with the Fifth Circuit, moreover, that the term "intimidate" is "obviously widely used and commonly understood in statutory

contexts." *CISPES v. FBI*, 770 F.2d 468, 477 (5th Cir. 1985); *see also United States v. Gilbert*, 813 F.2d 1523, 1530 (9th Cir.) (rejecting vagueness challenge to Fair Housing Act, 42 U.S.C. § 3631, which prohibits the use or threat of force to "injure, intimidate, or interfere with" a person because he or she is participating in certain housing programs), *cert. denied*, 484 U.S. 860 (1987); *Dinwiddie*, 76 F.3d at 924 (definition of "intimidate" in Access Act similar to that of an element in crime of assault). While "the fertile legal 'imagination can conjure up hypothetical cases in which the meaning of [disputed] terms will be in nice question,'" *Grayned*, 408 U.S. at 110 n.15 (quoting *American Communications Ass'n v. Douds*, 339 U.S. 382, 412 (1950)), the Access Act defines its terms narrowly and in clearly understandable language.

Protest, picketing, and other like activities lie at the core of free speech guaranteed by the First Amendment. For decades, courts have protected such forms of protest, regardless of the popularity of the protesters or their cause. Because this case is about only whether Congress can protect clinics engaged in the lawful provision of reproductive health services from physical disruption, our decision does not signal a weakening of those First Amendment protections.

## IV

Buried in one sentence of appellants' brief is their argument that the Access Act violates the Fifth Amendment's equal protection guarantee. According to appellants, since the statute allows labor but not anti-abortion picketing, it limits a particular form of social protest. Because anti-abortion activists are not a suspect class, and because the Access Act infringes upon no constitutionally protected rights, *see* Part III *supra*, we ask only whether Congress had a rational basis for prohibiting violent or

obstructive acts committed with intent to interfere with the provision of lawful medical services. For the same reasons that the Access Act survives appellants' First Amendment challenges, it clearly passes this more deferential test.

V

We turn finally to appellants' argument that the district court should not have granted the Government's Rule 12(c) motion because outstanding questions of fact precluded judgment on the pleadings. Specifically, they claim that the district court disregarded evidence that the Government has interpreted the Access Act to "proscribe[ ]" protesting, picketing, leafletting, singing, chanting, and the like, and that the Attorney General has attempted to enjoin anti-abortion protesters from engaging in those activities near abortion clinics. This argument ignores the Government's answers to appellants' requests for admission, where the Government stated, under oath, that none of appellants' First Amendment activities violates the Access Act.

Appellants' argument also comes perilously close to misstating the record. In one of the cases they rely on to support their claim that the Government is using the Access Act to punish First Amendment activity, the Government filed suit against several anti-abortion protesters who had stalked and threatened clinic employees and who had welded themselves inside cars blocking access to an abortion clinic. *United States v. Lindgren*, No. A3-95-4 (D.N.D. complaint filed Jan. 18, 1995). That complaint targeted neither speech nor picketing. Moreover, the remedy the Government sought—a 200-foot buffer zone around the clinic and its employees—was intended to protect protesters' First Amendment rights while also protecting the constitutional right to an abortion. *Id.* at 9-10.

In each of the other three cases appellants rely on, the Government prosecuted not speech, but only violent or disruptive conduct: blocking access to a clinic by welding protesters inside cars parked against clinic doors, *Milwaukee Women's Med. Serv's., Inc. v. Brock*, Civ. No. 94-C-0793 (E.D. Wis. complaint in intervention filed Dec. 20, 1994) at 3; and threatening, stalking, and assaulting clinic employees, *United States v. Smith*, No. 74:95CV-0025 (N.D. Ohio complaint filed Jan. 4, 1995) at 3-6, *United States v. Dinwiddie*, No. 95-1101-CV-W-8 (W.D. Mo. complaint filed Jan. 1995) at 2. In each case, the requested relief included buffer zones tailored to specific violations of the Access Act. *See Smith*, Compl. at 7-8 (requesting injunctive relief including 50-foot buffer zone around clinic and 25-foot buffer zone around doctor's home); *Brock*, Compl. at 5 (seeking injunctive relief including 50-foot buffer zone around clinic); *Dinwiddie* (W.D. Mo. temporary restraining order filed Jan. 6, 1995) at 7 (temporarily restraining defendant from locating within 500 feet of any reproductive health facility within court's jurisdiction). *See generally Madsen*, 114 S. Ct. at 2527-28 (upholding reasonably circumscribed buffer zones as remedy for violations of the law by anti-abortion protesters). The cases relied on by appellants thus fall far short of showing that the Government uses the Access Act to "proscribe" protected speech. Those cases involve a wholly separate question: whether courts sitting in equity may enjoin activities that do not violate the Act as a remedy for activities that quite clearly do violate the Act. That question has no bearing here.

Appellants argue that the District Court also ignored evidence that the Government was not applying the Act evenhandedly. Although they claim that the Government has refused to prosecute abortion clinic escorts and employees who

assault and threaten anti-abortion protesters, appellants make no selective enforcement allegation in their complaint, nor have they amended their complaint to state such a claim. In ruling on the Government's Rule 12(c) motion, the district court properly refused to consider evidence outside the scope of the complaint. *See Haynesworth v. Miller*, 820 F.2d 1245, 1249 n.11 (D.C. Cir. 1987) (Rule 12(c) requires movant to show, at close of pleadings, that no genuine issue of material fact remains to be resolved).

We affirm the judgment of the district court.

*So ordered.*

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RANDALL A. TERRY, et al.,

Plaintiffs,

v. Civil Action No. 94-1154 (HHG)

JANET RENO and ERIC HOLDER,

Defendants.

[FILED Nov. 21, 1995]

MEMORANDUM

I.

This action deals with the subject of activities engaged in by opponents of abortions outside facilities where abortions and other reproductive health services are performed. More specifically, it addresses the issue of the constitutionality of a federal law which restricts some of these activities. In that respect, the instant action is the first to be decided in this District. See infra.

The action is presently before the Court on the government's Motion for Judgment on the Pleadings. Upon consideration of the Motion, plaintiffs' Opposition thereto, the government's Reply, plaintiffs' Supplemental Memorandum, and the government's Response, the Court has determined that the

government's motion should be granted.

The Freedom of Access to Clinics Act ("FACE") was enacted by Congress in response to growing concern about violent acts occurring outside of reproductive health facilities. See generally S. Rep. No. 117, 103d Cong., 1st Sess. (1993). The Act provides that certain penalties shall be imposed on anyone who:

> (1) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services; . . . or
>
> (3) intentionally damages or destroys the property of a facility, or attempts to do so, because such facility provides reproductive health services . . .

18 U.S.C. § 248(a) (1994). For a first offense, the penalty is a fine and/or imprisonment of not more than one year; however, if the offense is "exclusively a nonviolent physical obstruction," the maximum fine is $10,000 and the maximum length of imprisonment is six months. Id. § 248(b). For a second or subsequent offense, the penalty is a fine and/or imprisonment of not more than three years. Id.

Plaintiffs, individuals opposed to abortion, brought this action challenging the constitutionality of FACE. Plaintiffs have participated in certain activities outside of various facilities that provide abortions, including counselling individuals entering the facilities, passing out literature, and engaging in prayers. They challenge FACE on First, Fifth, Eighth, Tenth, and Fourteenth

Amendment grounds. Plaintiffs also allege that FACE violates the Religious Freedom Restoration Act ("RFRA"). Plaintiffs seek declaratory and injunctive relief.

Defendants have moved to dismiss the action pursuant to Rule 12(c). That rule provides that "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." Fed. R. Civ. P. 12(c). "Rule 12(c) requires that the movant show, at the close of the pleadings, that no material issue of fact remains to be [re]solved, and that he or she is clearly entitled to judgment as a matter of law." Haynesworth v. Miller, 820 F.2d 1245, 1249 n.11 (D.C. Cir. 1987).[1]

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1. Plaintiffs argue that their complaint brings an "as applied" challenge as well as a facial challenge, and on that basis, they argue it is not amenable to disposition under Rule 12(c). To the contrary, such a challenge is subject to Rule 12(c) if, at the close of the pleadings, no genuine issues of material facts are in dispute. See Haynesworth, 820 F.2d at 1249 n.11. Accepting all well-pleaded facts of plaintiffs' complaint as true, see id., the Court finds no constitutional violations, as explained infra.

Plaintiffs also argue that there is a factual dispute regarding whether pro-life advocates are being subject to force or threats of force by pro-choice "escorts" at clinics. They argue that any physical response on the part of a pro-life advocate might violate FACE. Plaintiffs made no reference whatever to these activities in their original complaint, which has not been amended; these allegations are thus outside of the scope of the complaint. Under Rule 12(c), the Court may not consider matters outside of the pleadings unless the Court treats the

While no decision has been rendered in this Circuit, the constitutionality of FACE has been addressed elsewhere by several district courts and two Courts of Appeals.[2] Except for

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motion as one for summary judgment. Under Rule 7(a), if no counterclaim or cross-claim is pleaded in the answer, the pleadings close with the answer, unless the court orders a reply to be filed. See 2A James W. Moore, Moore's Federal Practice, ¶ 12.15 at 12-137(1995). Accordingly, plaintiffs' attempt to expand their complaint in order to create a genuine issue of material fact by alleging different facts and theories in their opposition than those presented in their complaint must fail. See 5A Charles A. Wright and Arthur R. Miller, Federal Practice and Procedure, § 1371 at 543 (1990) ("It is within the court's discretion whether to accept extra-pleading matter on a motion for judgment on the pleadings and treat it as one for summary judgment."); see also Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1550 (9th Cir. 1990) (if trial court considers evidence outside of the pleadings, it must treat rule 12(c) motion as a summary judgment motion). Plaintiffs may not make allegations outside of the scope of their complaint in order to avoid a Rule 12(c) dismissal. See United States v. Wood, 925 F.2d 1580, 1581 (7th Cir. 1991) (per curiam) (under Rule 12(c), "[t]he district court may not look beyond the pleadings").

2. Cheffer v. Reno, 55 F.3d 1517 (11th Cir. 1995); Woodall v. Reno, 47 F.3d 656 (4th Cir.), cert. denied, 115 S. Ct. 2577 (1995); American Life League, Inc. v. Reno, 47 F.3d 642 (4th Cir.), cert. denied, 116 S. Ct. 55 (1995); United States v. Lucero, 895 F. Supp. 1421 (D. Kan. 1995); United States v. White, 893 F. Supp. 1423 (C.D. Cal. 1995); United States v.

one district court in Wisconsin, United States v. Wilson, 880 F. Supp. 621 (E.D. Wisc. 1995), the courts have uniformly agreed that FACE is not constitutionality infirm. As elaborated below, this Court agrees with the reasoning of the tribunals which have upheld FACE, and it will therefore grant the government's motion for judgment on the pleadings.

The heart of plaintiffs' claims is embodied in the First Amendment. They argue that FACE violates their First Amendment rights to freedom of speech, freedom of the press, and freedom of assembly.

A. Freedom of Speech

Plaintiffs allege that FACE violates their freedom of speech in several ways. They argue that FACE is overbroad and vague; that it constitutes a prior restraint; that it does not serve a compelling (or even a significant or permissible) government interest; that FACE is not narrowly tailored and there are less

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Dinwiddie, 885 F. Supp. 1286 (W.D. Mo. 1995); United States v. Wilson, 880 F. Supp. 621 (E.D. Wisc. 1995); United States v. Wilson, 1994 WL 777319 (E.D. Wisc. Nov. 30, 1994); United States v. Brock, 863 F. Supp. 851 (E.D. Wisc. 1994); United States v. Hill, 1994 WL 818202 (N.D. Fla. Sept. 15, 1994); Riely v. Reno, 860 F. Supp. 693 (D. Ariz. 1994); Cheffer v. Reno, 1994 WL 644873 (M.D. Fla. July 26, 1994), aff'd, 55 F.3d 1518 (11th Cir. 1995); Cook v. Reno, 859 F. Supp. 1008 (W.D. La. 1994); Council for Life Coalition v. Reno, 856 F. Supp. 1422 (S.D. Cal. 1994); American Life League, Inc. v. Reno, 855 F. Supp. 137 (E.D. Va. 1994), aff'd, 47 F.3d 642 (4th Cir.), and cert. denied, 116 S. Ct. 55 (1995).

restrictive means available; that FACE is viewpoint- and content-based; that there are insufficient alternative channels of alternative communication; that FACE is an irrational and unreasonable restraint on speech in a public forum; and that FACE has a chilling effect because of its severe punishments and uncertain application.

As a preliminary matter, it is necessary to stress what the Act does and does not address. The Act prohibits injury, intimidation, and interference, that is accomplished "by force and threat of force or by physical obstruction." 18 U.S.C. § 248(a)(1) (1994). Indeed, it expressly provides that it shall not be construed "to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment." Id. § 248(d)(1). To put it another way, the Act regulates conduct, not speech, unless such speech constitutes a threat of force. See, e.g., Cook, 859 F. Supp. at 1010 ("The statute does not criminalize speech at all; rather, it regulates and proscribes conduct that uses force, the threat of force, or physical obstruction to achieve its objective."); see also United States v. Lindgren, 883 F. Supp. 1321, 1330 (D.N.D. 1995) ("Congress did not forbid harassment, rudeness, or intimidation, unless the conduct constitutes `force, threat of force, or physical obstruction.'"). However, because "[t]he Act might incidentally affect some conduct with protected expressive elements," it must be examined under the First Amendment. American Life League, 47 F.3d at 648.

The Fourth Circuit addressed First Amendment challenges similar to those raised here in American Life League v. Reno. The court first found that FACE was viewpoint and content neutral, id. at 649-50, and it further held that the statute was not

unconstitutionally overbroad or vague, and thus did not have a "chilling" effect on protected speech. Id. at 652-53. The Court applied the O'Brien[3] test, and held that the Act's incidental effect on speech from its regulation of conduct passed constitutional muster.[4] Id. at 651-52. This Court substantially agrees with the Fourth Circuit's analysis, and on that basis it rejects the plaintiffs' claims proffered on these grounds.

The Fourth Circuit also rejected arguments that FACE is unconstitutional to the extent that its injunctive relief provisions authorize prior restraints on speech. Woodall, 47 F.3d at 658. Here again, this Court agreed with the Fourth Circuit that any prior restraint challenges are premature in the absence of an injunction against the plaintiffs. See id.

With respect to the plaintiffs' remaining arguments, it is simply not so that there are insufficient alternative channels of alternative communication or that FACE is an irrational and unreasonable restraint on speech in a public forum. Consistent with the law, plaintiffs are fully able to communicate their messages in a non-violent manner. See American Life League, 47 F.3d at 652. In short, this Court finds nothing in FACE to be "irrational" or "unreasonable."

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3. United States v. O'Brien, 391 U.S. 367 (1968).

4. In applying the O'Brien test, the Fourth Circuit held that the Act furthered important or substantial governmental interests, that the government's interests were unrelated to the suppression of free expression, and that the Act was narrowly tailored. 47 F.3d at 651-52.

B. Freedom of Press

Plaintiffs also contend that the Act interferes with their ability to distribute literature advancing pro-life views, and thus infringes on the freedom of press. This argument totally lacks merit. The Act prohibits the use of force, threats of force, and physical obstruction only. It in no way prohibits plaintiffs from peacefully distributing literature. See Cook, 859 F. Supp. at 1010.

C. Freedom of Assembly

Plaintiffs also maintain that FACE interferes with their right to assemble in a traditional public forum. To repeat once again, that Act prohibits the use of force, threats of force, and physical obstruction only. It does not in any manner prevent peaceable assembly, as protected by the First Amendment. The Court discerns no interference with plaintiffs' right to peaceable assembly. Accordingly, the Court will grant defendants' motion for judgment on the pleadings on this count.

III

Plaintiffs' other constitutional challenges include claims that the Act violates the Fifth Amendment's Due Process and Equal Protection Clauses and the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishment. Plaintiffs also challenge Congressional authority to pass FACE. Finally, plaintiffs argue that the Act violates the Religious Freedom Restoration Act.

Plaintiffs' argument under the Due Process Clause is based upon the assumption that FACE is both vague and irrational. As the Court has held above, FACE is not unconstitutionally vague, and therefore it does not violate due process. See Riely, 860 F. Supp. at 705 n.9. The Court also finds that FACE is a rational and reasonable congressional response to growing

concerns about violence at reproductive health facilities. Thus, plaintiffs' due process challenge must fail.

Plaintiffs also contend that FACE violates equal protection because it is targeted at a particular social protest. Plaintiffs point out in support of their argument that their protests are subject to different burdens than protests by members of labor movements, for example. Defendants, in their answer, "[a]dmit that FACE does not apply to certain labor activities." The Court first notes that plaintiffs are not members of a suspect or quasi-suspect class. Because the Court concludes that FACE does not infringe upon a constitutionally protected right, the Act is subject to the rational basis test rather than a heightened level of security. Riely, 860 F. Supp. at 706. The Court finds this test to be amply met in light of the legislative history of the Act. See id.[5]

Plaintiffs also contend that the punishment provisions of FACE are disproportionate to the gravity of the offense, and thus constitute an "excessive fine and amount to cruel and unusual punishment, in violation of the Eighth Amendment." As the Eleventh Circuit noted, such challenges to FACE are not ripe in the absence of "the actual, or immediately impending, imposition of the challenged form of punishment."[6] Cheffer, 55

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5. Furthermore, even if strict scrutiny were to apply, the Court agrees with the Riely Court that the strict scrutiny standard would be satisfied as well. See id.

6. Specifically, the Eleventh Circuit held that the appellants' claims were not ripe because the court could not "determine from the face of the Act what penalties will actually be imposed," and because the "appellants have failed to show

F.3d at 1523 (citing Askins v. District of Columbia, 877 F.2d 94, 97-99 (D.C. Cir. 1989)). Accordingly, this Court holds that plaintiffs' Eighth Amendment claims are not ripe for consideration.[7]

Plaintiffs challenge the validity of FACE under the Tenth Amendment, arguing that Congress lacked the power to pass the Act under either the Commerce Clause, U.S. Const. art. I, § 8, or the Enforcement Clause, U.S. Const. amend. XIV, § 5. Here again, the Eleventh Circuit decided this issue when it addressed the power of Congress to pass FACE in light of the recently decided Supreme Court decision, United States v. Lopez, 115 S. Ct. 1624 (1995), which held that Congress exceeded its authority under the Commerce Clause when it passed the Gun-Free School Zones Act, 18 U.S.C. § 922(q). Cheffer, 55 F.3d at 1520-21. This Court agrees with the Cheffer Court that the Act "protects and regulates commercial enterprises operating in interstate commerce." 55 F.3d at 1520. Because the Act is a permissible exercise of congressional power under the Commerce Clause, it does not violate the Tenth Amendment. The Court therefore need not reach the question of whether Congress also has authority to pass the Act under the Fourteenth Amendment. See id. at 1521 n.7.

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that the mere existence of the Access Act causes them substantial hardship." 55 F.3d at 1524.

7. Even if these claims were ripe, the Court agrees with the Riely Court that "the harshness of the penalties provided is commensurate with the gravity of the proscribed conduct." 860 F. Supp. at 706.

Plaintiffs' Fourteenth Amendment argument is based on an assertion that FACE "empower[s] the states to engage in conduct violat[ing] . . . the First, Fourth, Fifth, Eighth, and Tenth Amendments."[8] As the court in Riely noted, "none of the other challenged provisions of FACE violate any of these constitutional provisions." 860 F. Supp. at 708. This Court agrees with the Riely Court that, as a result, "FACE does not violate these constitutional provisions by authorizing the state attorneys general to bring a civil action on behalf of individuals injured by those acting in violation of FACE." Id. at 709.

Finally, Plaintiffs contend that FACE violates the Religious Freedom Restoration Act ("RFRA"). RFRA provides that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." 42 U.S.C. § 2000bb-1(a) (Supp. V 1993). However also RFRA provides:

> Government may substantially burden a person's exercise of religion . . . if it demonstrates that application of the burden to the person --
>
> (1) is in furtherance of a compelling government interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.

Id. § 2000bb-1(b). Assuming, arguendo, that plaintiffs have demonstrated that FACE "substantially burdens" the exercise of their religion, cf. Cheffer, 55 F.3d at 1522, this Court agrees with the Fourth Circuit's conclusion in American Life League

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8. The statute allows state attorneys general to institute proceedings on behalf of persons injured by conduct violating FACE. 18 U.S.C. § 248(c)(3) (1994).

that FACE furthers a compelling governmental interest by sufficiently narrow means and thus does not violate RFRA. 47 F.3d at 656; see also Brock, 863 F. Supp at 866-67 (FACE does not violate RFRA); Riely, 860 F. Supp. at 709 (same); Council for Life Coalition, 856 F. Supp. at 1430-31 (same). Accordingly, defendants are entitled to judgment on the pleadings on this count as well.

IV

For the above stated reasons, the Court concludes that FACE does not violate either the Constitution or RFRA. Accepting as true well-pleaded facts of the complaint, defendants are entitled to judgment on the pleadings.

/s/ Harold H. Greene
HAROLD H. GREENE
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RANDALL A. TERRY, et al.,

Plaintiffs,

v. Civil Action No. 94-1154 (HHG)

JANET RENO and ERIC HOLDER,

Defendants.

[FILED Nov. 21, 1995]

Upon consideration of defendants' motion for judgment on the pleadings, plaintiffs' opposition, defendants' reply and plaintiffs' supplemental memorandum in opposition, and for the reasons set forth in the memorandum accompanying this order, it is this 22nd day of November, 1995,

ORDERED that defendants' motion for judgment on the pleadings be and it is hereby GRANTED; and it is further

ORDERED that plaintiffs' motion to compel depositions [#16] and defendants' motions for protective orders [#14, 28] are hereby DISMISSED as moot.

/s/ Harold H. Greene
HAROLD H. GREENE
United States District Judge

## APPENDIX D

1. **Commerce Clause, U.S. Const., art. I, § 8, cl. 3**

Section 8. [1] The Congress shall have Power . . . [3] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .

2. **U.S. Const. amend. I.**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

3. **U.S. Const. amend. V**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

4. **U.S. Const. amend. X**

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

# APPENDIX E

**Title 18 U.S.C. § 248. Freedom of access to clinic entrances**

**(a) Prohibited activities.**--Whoever--

**(1)** by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services;

**(2)** by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship; or

**(3)** intentionally damages or destroys the property of a facility, or attempts to do so, because such facility provides reproductive health services, or intentionally damages or destroys the property of a place of religious worship,

shall be subject to the penalties provided in subsection (b) and the civil remedies provided in subsection (c), except that a parent or legal guardian of a minor shall not be subject to any penalties or civil remedies under this section for such activities insofar as they are directed exclusively at that minor.

**(b) Penalties.**--Whoever violates this section shall--

**(1)** in the case of a first offense, be fined in accordance with this title, or imprisoned not more than one year, or both; and

**(2)** in the case of a second or subsequent offense after a prior conviction under this section, be fined in accordance with this

title, or imprisoned not more than 3 years, or both;

except that for an offense involving exclusively a nonviolent physical obstruction, the fine shall be not more than $10,000 and the length of imprisonment shall be not more than six months, or both, for the first offense; and the fine shall, notwithstanding section 3571, be not more than $25,000 and the length of imprisonment shall be not more than 18 months, or both, for a subsequent offense; and except that if bodily injury results, the length of imprisonment shall be not more than 10 years, and if death results, it shall be for any term of years or for life.

**(c) Civil remedies.--**

**(1) Right of action.--**

**(A) In general.**--Any person aggrieved by reason of the conduct prohibited by subsection (a) may commence a civil action for the relief set forth in subparagraph (B), except that such an action may be brought under subsection (a)(1) only by a person involved in providing or seeking to provide, or obtaining or seeking to obtain, services in a facility that provides reproductive health services, and such an action may be brought under subsection (a)(2) only by a person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship or by the entity that owns or operates such place of religious worship.

**(B) Relief.**--In any action under subparagraph (A), the court may award appropriate relief, including temporary, preliminary or permanent injunctive relief and compensatory and punitive damages, as well as the costs of suit and reasonable fees for attorneys and expert witnesses. With respect to compensatory damages, the plaintiff may elect, at any time prior to the

rendering of final judgment, to recover, in lieu of actual damages, an award of statutory damages in the amount of $5,000 per violation.

**(2) Action by Attorney General of the United States.--**

**(A) In general.**--If the Attorney General of the United States has reasonable cause to believe that any person or group of persons is being, has been, or may be injured by conduct constituting a violation of this section, the Attorney General may commence a civil action in any appropriate United States District Court.

**(B) Relief.**--In any action under subparagraph (A), the court may award appropriate relief, including temporary, preliminary or permanent injunctive relief, and compensatory damages to persons aggrieved as described in paragraph (1)(B). The court, to vindicate the public interest, may also assess a civil penalty against each respondent--

**(i)** in an amount not exceeding $10,000 for a nonviolent physical obstruction and $15,000 for other first violations; and

**(ii)** in an amount not exceeding $15,000 for a nonviolent physical obstruction and $25,000 for any other subsequent violation.

**(3) Actions by State Attorneys General.--**

**(A) In general.**--If the Attorney General of a State has reasonable cause to believe that any person or group of persons is being, has been, or may be injured by conduct constituting a violation of this section, such Attorney General may commence a civil action in the name of such State, as parens patriae on behalf of natural persons residing in such State, in any appropriate United States District Court.

**(B) Relief.**--In any action under subparagraph (A), the court may award appropriate relief, including temporary, preliminary or permanent injunctive relief, compensatory damages, and civil penalties as described in paragraph (2)(B).

**(d) Rules of construction.**--Nothing in this section shall be construed--

**(1)** to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment to the Constitution;

**(2)** to create new remedies for interference with activities protected by the free speech or free exercise clauses of the First Amendment to the Constitution, occurring outside a facility, regardless of the point of view expressed, or to limit any existing legal remedies for such interference;

**(3)** to provide exclusive criminal penalties or civil remedies with respect to the conduct prohibited by this section, or to preempt State or local laws that may provide such penalties or remedies; or

**(4)** to interfere with the enforcement of State or local laws regulating the performance of abortions or other reproductive health services.

**(e) Definitions.**--As used in this section:

**(1) Facility.**--The term "facility" includes a hospital, clinic, physician's office, or other facility that provides reproductive health services, and includes the building or structure in which the facility is located.

**(2) Interfere with.**--The term "interfere with" means to restrict a person's freedom of movement.

**(3) Intimidate.**--The term "intimidate" means to place a person

in reasonable apprehension of bodily harm to him- or herself or to another.

**(4) Physical obstruction.**--The term "physical obstruction" means rendering impassable ingress to or egress from a facility that provides reproductive health services or to or from a place of religious worship, or rendering passage to or from such a facility or place of religious worship unreasonably difficult or hazardous.

**(5) Reproductive health services.**--The term "reproductive health services" means reproductive health services provided in a hospital, clinic, physician's office, or other facility, and includes medical, surgical, counselling or referral services relating to the human reproductive system, including services relating to pregnancy or the termination of a pregnancy.

**(6) State.**--The term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.